IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

SATURDAY, THE 18TH AUGUST 2007 / 27TH SRAVANA 1929

CRL.A.No. 1095 of 2002()

SC.295/2000 of ADDL. SESSIONS COURT (AD HOC-II), THODUPUZHA

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APPELLANT: ACCUSED:

SABU, S/O. THANKAPPAN,
CHEMPUKATTIL VEEDU,
KURISUPARA KARA, ANAVIRATTY VILLAGE.

BY ADVS. SRI.M.P.PRABHANANDAN
SRI.SOJAN MICHEAL

RESPONDENT: COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL. M.P. NO.8620/2002 IN CRL. APPEAL NO. 1095 OF 2002.

DISMISSED

18.8.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 1095 OF 2002

Dated this the 18th day of August, 2007

JUDGMENT

This appeal is filed against the judgment in S.C. No. 295 of 2000 on the file of the Additional Sessions Court (Ad hoc-II), Thodupuzha. The appellant faced trial for the offence punishable under Section 55(a) read with Section 55(1)of the Abkari Act.

2. The prosecution case against the appellant - accused was that on 7.6.1998 at about 11 O' Clock, the appellant was found in possession of 15 bottles each containing 375 ml. of XXX Rum for the purpose of sale, without any licence or permit as per the provisions of the Abkari Act. To prove the case against the appellant, the prosecution examined PWs.1 to 5 and produced Exts.P1 to P7 as well as MOs.1 to 3. No oral or documentary evidence was adduced on the side of the defence. After closing the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. The appellant denied the allegations levelled against him and stated that on the day of the incident while he was waiting at the bus stop, the police came and arrested him and two others after enquiring

about a packet that was kept by the side of a shop. The trial court, relying on the evidence adduced by the prosecution, found the appellant guilty under Section 55(a) read with Section 55(1) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of three months. The appellant was also allowed the benefit under Section 428 Cr.P.C.

3. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant has raised the following contentions: (i) the finding of the trial court that the appellant committed offence punishable under Section 55(a) read with Section 55(1) of the Abkari Act is not legally sustainable in the light of the decisions of this Court reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631**, (ii) the finding of the trial court is based only on the evidence of the official witnesses, PWs.2, 3 and 5 as the independent witnesses did not support the prosecution case, (iii) the finding of the trial court that the

prosecution succeeded in proving the case against the appellant is not legally sustainable as PW.3 was not an officer empowered to detect or investigate the crime registered against the appellant as per the provisions of the Abkari Act. To substantiate this contention, learned counsel for the appellant placed reliance on the Government notification G.O.(P) No.69/96/TD dated 29.3.1996 (S.R.O. No. 321/96) and (iv) the sample produced before the court would not prove that the appellant was found in possession of the contraband articles as there is no evidence with regard to the production of the residue of the contraband articles seized.

5. The question to be considered in this appeal is whether the finding of the trial court that the appellant committed offence punishable under Section 55(a) read with Section 55(1) of the Abkari Act is legally sustainable or not.

6. The trial court mainly relied on the evidence of PWs.3, 4 and 5 to find the appellant – accused guilty of the charges levelled against him. PW.3 was the Assistant Sub Inspector of Police, Adimali. He stated that on 7.6.1998 while he was on patrol duty, he got information that a person was standing at Kallar town for selling liquor and that when he reached the place of incident, he saw the appellant carrying a plastic kit. He further

stated that on examining the plastic kit, it was found to contain 15 bottles, each containing 375 ml. of XXX Rum for the purpose of sale. This witness further stated that he prepared Ext.P1 mahazar, took three bottles out of the 15 bottles as samples and seized the remaining bottles and the newspaper contained in the kit for covering the bottles. He further stated that he arrested the accused and produced the articles seized before the court the next day. PW.4 was the police constable who had accompanied PW.3 at the time of detection of the offence. The evidence given by this witness regarding the detection of the offence, seizure of the contraband articles and arrest of the accused corroborates the version given by PW.3. PW.5 was the Sub Inspector of Police during the relevant time. He stated that he submitted the requisition for sending the samples for chemical analysis. Ext.P7 is the chemical report which shows that the three bottles of samples respectively contained 42.13, 42.24 and 42.13% of ethyl alcohol by volume. This witness further stated that he conducted investigation, questioned the witnesses , verified the enquiry conducted by PW.3 and laid the charge before the court.

7. Admittedly, the prosecution case, on the evidence of PWs.3, 4 and 5, is that the appellant was found in possession of 15 bottles of Indian made foreign liquor for the purpose of sale. But, none of these witnesses

had given any evidence with regard to any attempt made by the appellant to sell the liquor. Likewise, these witnesses did not adduce any evidence to show that the Indian made foreign liquor found in the possession of the appellant was imported. PWs.1 and 2, the independent witnesses also turned hostile to the prosecution. That apart, in the decisions reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631**, this Court had categorically held that to attract an offence under Section 55(a) of the Abkari Act, the prosecution should specifically allege and prove that the contraband articles found in the possession of the accused were in connection with export, import, transport or transit. In the light of the above principle, the finding of the trial court that the appellant committed offence punishable under Section 55(a) of the Abkari Act is not sustainable.

8. If the prosecution evidence, as spoken to by PWs.3, 4 and 5 is to be believed, what will be the offence committed by the appellant is the next question to be considered in this appeal. The appellant was found in possession of less than 6 litres of Indian made foreign liquor. Rules 11 and 11A of the Foreign Liquor Rules prohibits any person from transporting or possessing foreign liquor exceeding the quantity as

notified by the Government of Kerala under Sections 10 and 13 of the Abkari Act. Violation of Rules 11 and 11A of the Foreign Liquor Rules can be punished only under Section 63 of the Abkari Act. Section 63 of the Abkari Act reads as follows:

> "**For offences not otherwise provided for**:-- Whoever is guilty of any act or intentional omission in contravention of any of the provisions of this Act, or of any rule or order made under this Act, and not otherwise provided for in this Act shall, on conviction before a Magistrate, be punished for each such willful act or omission with fine which may extend to five thousand rupees or with imprisonment for a term which may extend to two years or with both."

9. Yet another point to be considered is regarding the contention of the learned counsel appearing for the appellant that PW.3 being an Assistant Sub Inspector of Police during the relevant time was not an authorized officer to detect or investigate the offence under the provisions of the Abkari Act. As per Section 4 of the Abkari Act, the Government of Kerala is empowered to authorize an officer of the State to detect or investigate an offence contemplated under the provisions of the Abkari Act. Sub-section (2) of Section 3 of the Abkari Act defines an Abkari Officer as follows:

> "**Abkari Officer:--** `Abkari Officer' means the Commissioner of Excise or any officer or other person lawfully appointed or invested with powers under Sections 4 or 5."

10. The Government of Kerala had notified that all police officers above the rank of Sub Inspector of Police is empowered to discharge all the duties conferred on an Abkari Officer. In this context, learned counsel for the appellant brought to the notice of this Court G.O.(P)No.69/96/TD dated 29.3.1996 (S.R.O. No.321/96). The said notification reads as follows:

> "In exercise of the powers conferred by section 4 of the Abkari Act, I of 1077 the Government of Kerala hereby appoint all police officers of and above the rank of Sub Inspector of Police in charge of Law and Order and working in the General executive branch of the Police Department and all Revenue Officers of and above the rank of Deputy Collectors to be Abkari Officers under their respective Jurisdiction for the purposes of Sections 31, 32, 33, 34, 35, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 59 of the Act and to exercise all the powers and to discharge all the duties conferred and imposed on Abkari Officers, in the sections aforesaid."

11. In the light of the above provisions, this Court is of the view

that the learned counsel appearing for the appellant was justified in taking the contention that PW.3 was not empowered to detect or investigate the offence. If so, the evidence of PW.3 corroborated by the evidence of PWs.4 and 5 would not prove any case against the appellant. PW.3 had not stated before the court below that he was in charge of the police station and hence he was empowered to investigate the crime. Even if he was empowered as per the provisions of Section 2(o) Cr.P.C., he cannot exercise the power conferred on an Abkari Officer. On this score also, the judgment of the trial court has to be set aside.

12. However, the case against the appellant projected through the evidence of PWs.3, 4 and 5 is that he was found in possession of 15 bottles, each containing 375 ml. of Indian made foreign liquor without any licence or permit and that the quantity exceeded the limit prescribed by the Government under Sections 10 and 13 of the Abkari Act. There is no legal bar in proving the prosecution case on the basis of the evidence of the official witnesses or the investigating officers, if their evidence is otherwise free from doubt or infirmity. But, since this Court has already found that PW.3 was not empowered to investigate the crime and PWs.1 and 2 turned hostile to the prosecution, this Court is of the view that the prosecution did not succeed in proving the case against the appellant by

adducing cogent and legally acceptable evidence.

13. In the light of the discussions made in this judgment, this Court is of the view that the appellant is entitled to an acquittal. Accordingly, the impugned judgment is set aside and the appellant is acquitted of the charges levelled against him.

The Crl. Appeal is allowed as above. The bail bonds executed by the appellant shall stand cancelled.

(K.THANKAPPAN, JUDGE)

sp/

C.R.

K.THANKAPPAN, J.

CRL.A. NO.1095/2002

JUDGMENT

18TH AUGUST, 2007.